IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

Acute Nursing, Inc. and Tropical Nursing, Inc.,	:	
	:	C.A. No. 04-10-0097
Plaintiffs,	:	
v.	:	
Westminster Village,	:	
Defendant.	:	

Submitted: August 22, 2006

Decided: August 22, 2006

Decision on Plaintiffs' Motion for Reargument on its Request for Trial *De Novo*

and Defendant's Motion for Sanctions

Plaintiffs' Motion is denied.

Defendant's Motion for Sanctions is granted.

Charles S. Knothe, Esquire, 14 The Commons, 3516 Silverside Road, Wilmington, Delaware, 19810, Attorney for Plaintiffs.

Elizabeth King, Esquire, Potter, Anderson & Corroon, LLP, Post Office Box 951, Wilmington, Delaware 19899-0951, Attorney for Defendant.

Trader, J.

In this *de novo* appeal from the Order of an arbitrator, I hold that the plaintiffs have not made diligent efforts to comply with the time frame of Rule 16.1. Additionally, the defendant is entitled to reasonable expenses, including attorney's fees, because of the plaintiffs' failure to appear and participate at the arbitration hearing.

On October 19, 2004, Acute Nursing, Inc. filed this civil action against Westminster Village, and service of process was obtained upon the defendant on October 28, 2004. On October 4, 2005, the civil clerk sent a notice to plaintiffs' counsel under Rule 41(e) advising him that the case would be dismissed if it remained inactive for another thirty days. On November 9, 2005, plaintiffs' counsel moved to amend the caption to include Tropical Nursing, Inc. as a plaintiff and this motion was granted by the Court on December 7, 2005. On April 12, 2006, the defendant filed an Answer to the Complaint and on May 10, 2006, Ronald D. Smith was appointed as arbitrator in the case.

On June 8, 2006, defense counsel sent a letter to the arbitrator suggesting proposed dates for the mandatory arbitration. On Wednesday, May 31, 2006, the arbitrator's legal assistant sent an email to plaintiffs' counsel suggesting four dates when both Mr. Smith and defense counsel were available for the arbitration hearing. Plaintiffs' counsel replied that his client would not travel from Hawaii to Delaware for arbitration and that he would not attend either. On June 9, 2006, Ronald D. Smith, Esquire informed both parties that the arbitration hearing would be held on July 14, 2006. On that date, the defendant appeared for the arbitration hearing, but neither the plaintiffs nor their attorney appeared at the hearing. On the date of the scheduled hearing the arbitrator entered an Order in favor of the defendant assessing costs against the plaintiffs. On the same date,

the clerk of the court entered the arbitrator's Order on the docket in this case. On August 4, 2006, the twenty-day time period for requesting a trial *de novo* expired without a demand by the plaintiffs.

On August 8, 2006, the defendant filed a motion to enter the arbitrator's Order as an order of judgment. On August 8, 2006, plaintiffs filed a request for trial *de novo* and on August 14, 2006, plaintiffs filed a response to the defendant's motion to enter judgment on the arbitrator's Order. On August 9, 2006, the Court entered a judgment on the arbitrator's Order and on August 14, 2006, the Court denied the plaintiffs' request for a trial *de novo*. Thereafter, the plaintiffs filed a motion for reargument and the defendant has filed a motion for sanctions.

In a motion for reargument, the Court must consider whether it overlooked a precedent or legal principle that would have a controlling effect, or that it has misapprehended the law. *Gass v. Truax*, 2002 Del. Super. LEXIS 442 (June 28, 2002). In this case, I hold that I did not misapprehend the law or a controlling legal precedent. Therefore, the motion for reargument should be denied.

The Court of Common Pleas has the authority to permit the filing of a late demand for trial *de novo* after a Rule 16.1 arbitration. *PNC Bank, Delaware v. Hudson,* 687 A.2d 915 (Del. 1997). This is only if the moving party outside the proper time period shows excusable neglect. *Hall v. McGuigan*, 1997 WL 527965 (Del. Super. Aug. 18, 1997).

"Diligent efforts to comply with the rule demonstrate excusable neglect." *Anticaglia v. Benge*, 2000 WL 145822 at *2 (Del. Super. Jan. 20, 2000). There must be genuine efforts to comply with the applicable court rule. *Id*. "Negligence without a valid

reason is not sufficient to constitute excusable neglect." *Id.* Excusable neglect has been found where the contact between the parties represent a clear indication that the defendant was not ignoring the lawsuit and recognized the need to take action. *Id*.

In the case before me, as in *Whitaker v. Goodwin,* 2002 WL 1587857 (Del. Super. July 2, 2002), the plaintiffs have not made any effort to comply with Civil Rule 16.1(k)(11)(D). The facts in this case demonstrate the plaintiffs' lack of diligence.

On October 2005, the case was almost dismissed by the Court because of inactivity by the plaintiffs. The arbitrator sent several emails to plaintiffs' counsel requesting an agreement on a date to hold the arbitration hearing and plaintiffs' counsel filed a reply on June 9, 2006 that neither he nor his client would attend the arbitration hearing. An arbitration hearing was scheduled by the arbitrator that would be held on July 14, 2006. The defendant appeared for the arbitration hearing, but plaintiffs did not appear for the hearing. An arbitration order was entered by the arbitrator on July 14, 2006 and plaintiffs' request for a trial *de novo* was not filed with the Court until August 8, 2006. Thus, plaintiffs' demand for trial *de novo* was filed four days past the time had expired for doing so.

Plaintiffs argue that they had no knowledge of the arbitrator's decision until plaintiffs' counsel received a copy of the Order on August 1, 2006. However, this fact in and of itself does not establish excusable neglect in view of the fact that the plaintiffs and plaintiffs' counsel failed to attend the arbitration hearing. Additionally, counsel for the plaintiffs knew that the arbitration hearing would proceed and should have known the arbitrator had a right to enter an order against the plaintiffs on the same date that the hearing was scheduled. C.C. P. Civil Rule 16.1(k)(3). A telephone call to the civil clerk

would have revealed to plaintiffs' counsel that an arbitration Order was entered on the same date the plaintiffs failed to appear.

Finally, plaintiffs' counsel was aware of the arbitrator's Order as of August 1, 2006 and the Order on its face indicates the entry date of July 14, 2006. No explanation is offered as to why a timely demand for trial *de novo* was not filed prior to August 5, 2006. Because the plaintiffs have made no efforts to comply with Civil Rule 16.1(k)(11)(D), they cannot establish excusable neglect. Accordingly, the plaintiffs' motion for reargument is denied.

The defendant requests that the Court impose sanctions against the plaintiffs because of their failure to appear and participate at the arbitration hearing. Court of Common Pleas Civil Rule 16.1(k)(9) states the failure to appear and participate by any person whose attendance is required shall subject the offender to sanctions under Rule 37(d) of Court of Common Pleas Civil Rules. Civil Rule 37(d) states that "the Court shall require the party failing to act or the attorney advising that party or both shall pay reasonable expenses, including attorney's fees, caused by the failure . . . . "

Rule 37(d) places the burden on the disobedient party to establish that his failure to appear was substantially justified or that other circumstances make an award of expenses unjust. The plaintiffs have asserted no good reason for their failure to appear at the arbitration hearing. The purpose of the rule is to encourage the award of expenses where a party fails to comply with the rules. *Wileman v. Signal Finance Corp*., 385 A.2d 689 (Del. 1978). Therefore, this Court will award reasonable expenses, including attorney's fees, to the defendant.

In summary, the plaintiffs' motion for reargument and their request for trial *de novo* are denied. The defendant's motion for sanctions is granted.

IT IS SO ORDERED.

Merrill C. Trader
Judge